

BOOK REVIEWS

WILLIAM E. SCHEUERMAN, ED., *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*. Berkeley and Los Angeles: University of California Press, 1996. vii, 268 pp. \$40.00.

This welcome volume gathers together nine essays, four in original translations, by a pair of highly respected refugee scholars from Nazi Germany. Franz Neumann and Otto Kirchheimer, both young labor lawyers and active adherents of the Social Democratic Party (SPD) before 1933, are best known to English-speaking readers for their studies, respectively, of the Nazi state.¹ Neumann's *Behemoth*, though first published in 1942 well before the demise of the "Third Reich" and the flood of archival documentation the Nuremberg trials unleashed, is still generally regarded as one of the most penetrating analyses of Nazism; while Kirchheimer's wide-ranging book enjoys the status of a standard work on its subject. In the selection of their articles under review, to which William Scheuerman has contributed a helpful introduction, Neumann is represented by four and Kirchheimer by the remaining five pieces that except for one all appeared elsewhere between 1932 and 1967. They are grouped here into three chronologically distinct sections, each also comprising a trio of papers.

Those in part one deal with the Weimar Republic on the eve of Hitler's appointment as chancellor and aim particularly to critique the anti-democratic political philosophy of Professor Carl Schmitt, then Germany's leading nationalist-conservative constitutional theorist who at least initially became an apologist for Nazi rule. From a marxist perspective Kirchheimer took strong issue with the late Weimar practice of government by presidential decree to the exclusion of the Reichstag, which Schmitt's imprecise concept of "legitimacy" justified as being superior to strict legality under the constitution. Thus, his "extremely influential" (p. 8) treatise *Legality and Legitimacy* of 1932, with its "bleak assessment of the impossibility of democracy's situation in a heterogeneous society," was rejected by Kirchheimer: it had "not been sufficiently grounded" (pp. 69-70). Yet Schmitt's main thesis, that the Weimar Republic was collapsing because of internal contradictions in its own constitution, soon proved accurate. From their refuge at the Institute for Social Research in New York, the heir to the famed "Frankfurt School", the two scholars proceeded to monitor the legal and political development of the Nazi dictatorship. In the Institute's journal, *Zeitschrift für Sozialforschung*, Neumann investigated the process by which Germany under Hitler had abandoned the traditional *Rechtsstaat*, that is the state ruled by laws rather than by the whims of men. Following an historical examination of European thought since the later Middle Ages on the relationship between individual freedom and governmental power Neumann concluded that by 1937 German law had become "nothing but the command of the leader": "If law and the leader's will are identical and if the leader can have political foes killed without legal trial and this action is then celebrated as the highest realization of law" (as happened by the bloody purge of the leadership of the brown-shirted Storm Troopers on 30 June 1934, which Hitler—and Carl Schmitt—subsequently declared legally permissible), "then one can no longer speak of law in a specific sense" (pp. 133-4).

1. *Behemoth: The Structure and Practice of National Socialism 1933-1944* (New York, 1944, 2nd. rev. ed.) and of *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, 1961).

The Nazi rejection of centuries-old legal principles was also the subject of a brochure by Otto Kirchheimer, writing under a pseudonym, that was smuggled into Germany in the mid-1930s. In it he measured German reality against the discussions held at the International Congress of Criminologists in Berlin in 1935, and prophesied that the "Third Reich" with its characteristic institutions of the Gestapo and the People's Court—the former "permitted to use any methods they deem necessary to get the results sought by their supervisors" while the latter "cannot be described as a court at all . . . but a politically motivated administrative body . . . outfitted with unlimited discretionary power over the fate of all German citizens" (pp. 153-4)—would not long endure.

The three papers which round off the collection stem from the post-1945 period and testify to the increasing Americanization (and lessening allegiance to marxism) on the part of both authors. However, neither Neumann nor Kirchheimer lost interest in the political phenomenon that propelled them to the United States; witness, for example, Kirchheimer's cogent observation concerning the 1965 debate in the Federal Republic of Germany on the statute of limitations for National Socialist murders, to the effect that since 8 May 1945 31.8 percent of those tried for such crimes had been acquitted, versus an overall acquittal rate in German courts during the 1950s of only 8.5 percent (p. 253). Notwithstanding a few lacunae (the S.S. and the concentration camps are scarcely mentioned in any essay) and references left obscure by the editor (on p. 41 the "steel-helmets" were the veterans' organization Stahlhelm), this is a worthwhile tribute to two ornaments of German democratic scholarship.

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L. FOXHALL AND A.D.E. LEWIS, EDS., *Greek Law in its Political Setting: Justifications not Justice*. New York: Clarendon Press, 1996. viii, 172 pp. \$45.00.

This book contains seven papers presented seven years ago at a seminar series held at the Institute of Classical Studies, London. The lengthy interval has affected the collection's freshness. Two papers have already appeared in print, and the editors' stated intention to examine Greek law in its social and political context (p. 1) rather than to employ "formalist and evolutionary approaches" no longer distinguishes the volume from current scholarly trends.

The two most informative papers are Rosalind Thomas' on codification of law (pp. 9-31) and Gerhard Thür's on the function of oaths in dispute settlement (pp. 57-72), which shed considerable light on early Greek concepts of justice and legal procedure. Thomas presents a plausible alternative to the view that early Greek laws were first written down because of a desire for more equal treatment. She argues that inscription on stone was originally intended to supplement customary law, fixing those enactments about which no universal agreement obtained (p. 26). Her demonstration that a vigorous oral tradition of customary laws survived well into the classical period is particularly cogent (p. 11). Using two well-known passages from Homer, the dispute between Antilochus and Menelaus in *Iliad* 23 and the judgement of the village elders depicted on Achilles' shield in *Iliad* 18 (pp. 64-70), Thür contends that early Greek law used "decisory oaths" sworn by litigants to settle disputes. As a result, the verb *dikazein* means not "to